

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 06-1312

JUNE 13, 2007

MARCUS EUGENE BLUE
APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION, [NO. CR2006-115]

V.

HONORABLE WILLARD PROCTOR,
JR., JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant Marcus Blue was convicted of two counts of aggravated robbery, theft of property, kidnapping, and an enhancement for possessing a firearm. He was convicted by a jury in Pulaski County Circuit Court. On appeal, appellant argues that the aggravated robbery convictions are not supported by sufficient evidence of his intent; and that the trial court abused its discretion in allowing the State to enter a nine-millimeter handgun into evidence. After consideration of this appeal under the proper standards, we affirm.

We first consider the sufficiency-of-the-evidence argument on appeal, as we must. A motion for a directed verdict at a jury trial is a challenge to the sufficiency of the evidence. *See* Ark. R. Crim. P. 33.1 (2004); *Graham v. State*, 365 Ark. 274, __ S.W.3d __ (2006). When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is

viewed in the light most favorable to the State. See *Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755 (2003). Only evidence supporting the verdict will be considered. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.*

The State charged appellant with aggravated robbery, which required proof that appellant robbed the victims while armed with a deadly weapon or that he robbed them while representing by word or conduct that he was so armed. Ark. Code Ann. § 5-12-103 (Repl. 2006). “Robbery” as charged in this instance required proof that appellant used force or threat of force with the purpose to commit theft. Ark. Code Ann. § 5-12-101 (Repl. 2006).

Appellant’s counsel moved for directed verdict in this trial challenging the State’s proof of his intent to rob the victims, asserting that appellant only wanted to talk to the victims. The trial court denied this motion and its renewal at the close of the case, preserving the issue for appeal. We are guided by the legal principle that a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Fairchild v. State*, 349 Ark. 147, 76 S.W.3d 884 (2002); *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363 (2001).

At trial, the evidence, viewed most favorably for the State, demonstrated that at approximately 9:00 p.m. on October 17, 2005, appellant approached his former girlfriend Jessica Scarborough and her male companion Nathaniel (Nate) Hazelwood in the parking lot of Nathaniel’s apartment complex in Little Rock, Arkansas. Jessica met Nate through appellant, and Jessica said they were friends; she described Nate as her support system while she was ending

the relationship with appellant. Jessica said she often felt used by appellant when they were together because appellant only wanted her money.

On that night, Jessica was driving, and Nate was her passenger. As Jessica pulled her vehicle in and came to a stop, appellant walked up to her partially-opened window. Another male, later identified as Jeff, walked up to the passenger side. A female, later identified as Tonya, drove another vehicle behind Jessica's car, blocking her in so that she could not drive away.

Appellant reached into Jessica's car, took her cell phone away from her and removed the battery, and demanded that she and Nate get out of the car or be killed. Jessica said she pleaded with appellant to stop, and appellant replied that he just wanted to talk, for her to just do what he said and everything would be fine. Appellant demanded that they get out of the car. Jessica said it looked like both appellant and the other man "had something in their pockets that looked like a gun." Nate said he saw appellant holding a gun, which had the word "Ruger" on it and which Nate thought was a semi-automatic weapon. The prosecutor showed Nate a Ruger P89 gun that had been taken from appellant about a month after the attack. Nate said it looked like the gun he saw that night.

Nate and Jessica exited her car. All five (Nate, Jessica, appellant, Jeff, and Tonya) walked toward Nate's apartment and all entered. Once inside, appellant called Jessica a "stupid bitch" and hit her in the eye with his fist, causing her to fall to the floor. Appellant pressed his foot on top of her head onto the floor. She said he stomped on her head and compressed his foot on her neck to cut off her ability to breathe. Jessica said the attack went on for fifteen

minutes, interspersed with appellant telling her he would “f--- [her] with his nine” and kill her. He called Jessica his “little white girl that he owned.” Jessica said she saw appellant holding a square-shaped gun.

Nate said that he was forced to sit on his couch while this was happening, and Jeff stood over him. At one point Nate started to get up to help Jessica, but appellant hit him in the eye, which filled with blood. Nate could not see out of that eye, and he fell back to the couch. Appellant then kicked Nate in the mouth, ripping the skin and causing his mouth to bleed.

Appellant directed Tonya to dig through Jessica’s purse, where she pulled out Jessica’s debit card. Appellant asked Jessica if she had money in the bank; she said “no.” They took all the money she had in her purse, about ten to fifteen dollars. When Nate regained consciousness, he saw appellant holding a gun to Jessica’s head. They emptied Nate’s wallet.

Nate offered to give appellant a thousand dollars when he got paid to make him stop attacking Jessica. Thereupon, appellant picked Jessica up by her hair and tossed her to the couch beside Nate, telling Nate he could have the “bitch.” Appellant then took a cell phone charger and lashed Nate and Jessica with it, telling them to have his money by that Friday or he would kill them.

Appellant, Jeff, and Tonya left, but came back shortly thereafter, asking for a knife. One was sitting in the open, which they retrieved and then left again. A short time later, Jessica came outside, discovering that her tires had been slashed. Jessica and Nate asked a neighbor to take them to the hospital, where Jessica was treated for bruising on her arms, legs, head, face, and neck. She had bald spots from hair being yanked out of her head. Nate had injuries to his

eye and mouth, which required seven stitches. His eyesight did not return until a week had passed.

A police detective took photographs of Nate and Jessica to capture images of their injuries. This detective verified that he went to the apartment complex and found Jessica's car parked in front of Nate's apartment; the car had two flat tires.

After the State rested, appellant moved for a directed verdict regarding aggravated robbery on the basis that appellant only wanted to talk to the victims, not rob them. This motion was denied. Appellant then took the stand, testifying that he had a verbal quarrel with Jessica, and he did hit her and Nate with the phone charger and struck them both. However, he claimed that he did not have a gun, did not pull it out, and did not take anything. Appellant testified that he was a drug dealer, and Jessica was supposed to be getting Nate to buy more drugs from him and that he was just "messaging" with them. Appellant thought that Nate testified that appellant used the Ruger against them only because Nate had seen appellant with that gun before when they spent time together.

On the foregoing evidence, the jury found that appellant was guilty of aggravated robbery, among other crimes. Appellant argues on appeal that there is insufficient proof that he intended to rob Jessica and Nate because (1) everyone agreed that appellant at first said he just wanted to talk; (2) it was Tonya, not appellant, who purportedly dug through Jessica's purse; and (3) it was Nate who brought money into the situation by offering him money to stop the beating. We are not persuaded. We are duty-bound to view the evidence in the light most favorable to the State. The victims clearly testified that appellant, with accomplices, used force

and weapons to effect a taking of the victims' property. This is more than sufficient evidence, both direct and circumstantial. We affirm this point.

Appellant's other point on appeal concerns an evidentiary ruling, regarding the admission of the gun found on appellant a month after this attack. At a pretrial hearing, the State sought permission to introduce the later-acquired gun pursuant to Ark. R. Evid. 404(b). Rule 404(b) states that, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This list of exceptions is not exclusive but instead represents examples of circumstances where other acts are admissible and relevant. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994). In order to be admissible under Rule 404(b), the evidence must be "independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal," and if so, then evidence of that conduct may be admissible with a proper cautionary instruction by the court. *Lindsey, supra* at 138.

Appellant resisted the State's motion on the bases that this gun was not relevant to the present criminal trial, that it was not definitively the gun purportedly seen by the victims, and that any probative value was outweighed by unfair prejudice. The trial court initially ruled in appellant's favor, excluding this gun recovered from appellant on November 22, 2005, when he was arrested and the gun taken. However, during trial, the State reiterated its attempt to

enter the gun into evidence because Nate could testify that it looked like the gun used against him and Jessica. Over the defense's objection, the trial judge allowed it at that point.

Nate was shown the gun, and he testified that it looked like the same gun, having the word "Ruger" in the same place he saw it that night. Nate admitted that during the attack he believed there were gold embellishments along the top, but actually seeing this gun in the courtroom, he saw that it was simply shinier in the light along the top.

Appellant contends that this may not have been the gun used by appellant on the night of the attack, and therefore, it had no probative value and was simply prejudicial evidence. The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the trial court, and we will not reverse absent a showing of manifest abuse. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999); *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244 (1997).

The trial court did not abuse its discretion. That appellant had access to and possessed a gun was relevant to the State's proof of aggravated robbery. Both victims testified to appellant possessing a gun that appellant called a "nine" that night, it was stated to look like the one used on the them, and appellant admittedly owned a nine millimeter handgun. *Compare Tate v. State*, 367 Ark. 576, __ S.W.3d __ (2006); *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004). We hold that the trial court did not abuse its considerable discretion in this instance.

We affirm.

PITTMAN, C.J., and HEFFLEY, J., agree.